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INTENT V. PRACTICE:
INCENTIVES AND DISINCENTIVES FOR
CHILD ABUSE REPORTING BY SCHOOL PERSONNEL

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Lelia Helms**
Carolyn Wanat***

I. INTRODUCTION

There is extensive literature on child abuse and state law reporting requirements for school personnel. This literature focuses primarily on descriptions of reporting mandates and on reviews of the caselaw resulting from instances of abuse occurring in school settings.¹ The reporting laws, however, were originally intended to facilitate identification by school personnel of the broader problem of abuse and neglect arising in home settings.² Lawmakers viewed teachers, by virtue of their daily intensive contact with students, as being well positioned to observe and report evidence of abuse by parents or adults responsible for the care of children. To date, there has been little discussion in education literature about the problems that schools encounter in identifying abuse occurring in home settings. Instead, most analyses describe problems of abuse occurring in school settings by school personnel or other

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1. For a helpful overview see William F. Foster, *Child Abuse in Schools: The Statutory and Common Law Obligations of Educators*, 4 EDUC. & L. J. 1 (1992); Frederica K. Lombard et al., *Identifying the Abused Child: A Study of Reporting Practices of Teachers*, 63 U. DET. L. REV. 657 (1986); Ruth V. Siegel, Comment, *Failure to Report Suspected Child Abuse: Potential Civil Rights Liability for School Districts*, 34 WEST'S EDUC. L. REP. (1986); Richard G. Salmon & M. David Alexander, Comment, *Child Abuse and Neglect: Implications for Educators*, 28 WEST'S EDUC. L. REP. 9 (1985) [hereinafter *Salmon & Alexander*]; Eric S. Mondschein, *Legal Responsibility of Educators in Child Abuse*, in SCHOOL LAW UPDATE: PREVENTIVE SCHOOL LAW 36 (Jones, Semler, eds., 1984); Sanford N. Katz et al., *Legal Research on Child Abuse and Neglect: Past and Future*, 11 FAM. LAW Q. 151 (1977).

2. Marjorie R. Freiman, Notes, *Unequal and Inadequate Protection Under the Law: State Child Abuse Statutes*, 50 GEO. WASH. L. REV. 243 (1982).

students. This review examines the effects of the statutes and caselaw which encourage or discourage reporting of abuse by teachers and administrators. The analysis focuses primarily on distinguishing between school personnel as reporters of abuse and neglect in the home and as reporters of abuse within the school. Cases addressing abuse committed in the home are the primary source of data. Cases arising from abuse committed by school personnel are included where the distinctions and underlying differences in incentive structures facilitate analysis. This review will first outline federal and state legislative responses to the societal problem of child maltreatment. An analysis of the problem of effective enforcement of the reporting laws in education and a review of the pertinent caselaw will follow. Discussion of the implications for implementation and possible reform builds upon these findings.

II. BACKGROUND

Since 1962, all states, Washington D.C., Puerto Rico and the Virgin Islands have enacted child abuse reporting statutes. The statutes have undergone a three-phase evolution — (1) mere identification of the abused child; (2) identification succeeded by an investigation to authenticate the claim; and (3) identification, investigation, and intervention to the extent necessary to prevent further abuse and still support the family unit.³ The articulated purpose of state child abuse reporting statutes is to protect children, not to punish those who mistreat them.⁴ The realization that state child protection laws were not working led to further reform.⁵ In 1974 the Child Abuse Prevention and Treatment Act was signed into federal legislation.⁶ The Act provides incentives for states to amend their reporting statutes to comply with federal requirements by providing financial assistance to states that had programs in place for child abuse and neglect identification, prevention, and

3. *Id.* at 252.

4. *Id.*

5. Douglas J. Besharov, *Behind Closed Doors*, 3 FAM. ADVOC. 3, 4 (1980) (citing downfalls in the existing agencies and evidence of inadequate procedures for dealing with the pervasive problem of implementing a child protection system, including loss of information and unreasonable delays).

6. Pub. L. No. 93-247, 88 Stat. 4 (1974) (codified as amended at 42 U.S.C. § 5101-5106 (1988)).

treatment.⁷ The costliness of child protection programs made some financial assistance almost a necessity. Federal requirements for financial assistance mandate specific guidelines for the reporting process. These include: reporting of known and suspected instances of child abuse or neglect; provisions immunizing reporters from prosecution; prompt investigation upon receipt of the mandated report to determine its accuracy and to implement necessary protection for the child; evidence of administrative procedures, personnel, training procedures, facilities, and multidisciplinary programs or services being in effect; preservation of confidentiality of all records to protect the rights of the child, parents, and guardian; cooperation of law officials, courts, and state human services agencies; appointment of a guardian *ad litem* to represent the child in legal proceedings; assurance of funding equal to the funding in 1973, appropriate use of federal funds, and an increase of state funding where possible; public dissemination of related information; and, where feasible, extension of preferential treatment to parental organizations combating child abuse.⁸

The National Center on Child Abuse and Neglect created the 1974 Act and developed a Model Child Protection Act⁹ that states have used for guidance in developing statutes and policies. The Model Act includes a concise, working definition of child abuse and neglect:

... child abuse and neglect means the physical or mental injury, sexual abuse, negligent treatment, or mistreatment of a child under the age of eighteen by a person who is responsible for the child's welfare under circumstances which indicate that the child's health or welfare is harmed or threatened thereby, as determined in accordance with regulations prescribed by the Secretary.¹⁰

Additional federal legislation included amending the Social Security Act in 1975 to require states receiving federal social service grants to provide protective services for physically abused children.¹¹

7. 42 U.S.C. § 5104(a)-(b)(1) (1988).

8. 42 U.S.C. § 5102(b)(2) (1988).

9. 42 U.S.C. § 5112 (1988) [hereinafter Model Act].

10. 42 U.S.C. § 5102 (1988).

11. Pub. L. No. 93-247, 88 Stat. 4 2337 (1974) (codified as amended in 42 U.S.C. 5101-06 (1988)).

The fundamental component of state abuse and neglect statutes is the identification of a cadre of professionals to function as mandatory reporters of suspected or known child abuse or neglect. Statutes name physicians, nurses, surgeons, medical examiners or coroners, dentists, osteopaths, optometrists, chiropractors, podiatrists, school teachers and officials, police, peace or law enforcement officers, social workers, and day care personnel as reporters.¹² As a group of non-medical reporters, uniquely positioned to observe and monitor children through consistent and continuing interaction, teachers are of special interest to this review.¹³ Forty-nine states have included school teachers and officials as mandatory reporters; Vermont includes school teachers in a category of permissible reporters.¹⁴ Reports by all persons who know or have reasonable cause to suspect child abuse or neglect are generally accepted by most states, regardless of the reporter's nonmandated status.

III. LIMITED EFFECTIVENESS OF STATUTES

Despite the federal requirements, financial incentives, and Model Act guidance, state child abuse reporting laws are still ineffective as a means to protect children through identification by mandatory reporters, investigation, and intervention.¹⁵ Possible explanations for this limited compliance by school personnel include: (1) the ambiguities and vagueness of individual state statutes, (2) the lack of incentives for mandated reporters to report suspected or known instances of child abuse or neglect, and (3) the dynamics of school settings which may deter reporting by teachers under the statutes.

A. Statutory Ambiguity

Three areas of statutory ambiguity may lead to ineffective reporting: (1) the definitions of "abuse" and "neglect"; (2) the

12. Salmon & Alexander, *supra* note 1, at 13.

13. Nadine Abrahams et al., *Teachers' Knowledge, Attitudes and Beliefs About Child Abuse and Its Prevention*, 16 CHILD ABUSE & NEGLECT 229-38 (1992); Garry Baxter & John Beer, *Educational Needs of School Personnel Regarding Child Abuse and/or Neglect*, 67 PSYCHOL. REP. 75 (1990) [hereinafter Baxter & Beer]; Jody Aaron, Note, *Civil Liability for Teacher's Negligent Failure to Report Suspected Child Abuse*, 28 WAYNE L. REV. 183, 184 (1981).

14. Salmon & Alexander, *supra* note 1, at 13.

15. Model Act, *supra* note 9, § 6 commentary.

identification of an abuser; and (3) the degree of certainty necessary to sustain a report of abuse or neglect. The contents of the report, the methods of reporting, the agency to which the report should be made, and the immunization of the reporter from prosecution are fairly well-defined and generally understood elements of most state statutes. Other than the succinct definition offered by the Model Act, there are no universal definitions of abuse or neglect upon which mandatory reporters can prudently rely. "Child abuse" was originally defined by the diagnostic term "battered child syndrome," a medical term which gained common understanding in the 1960s.¹⁶ Today, the definition of "child abuse" is construed more broadly, including elements of physical injury, mental or emotional injury, sexual molestation, and neglect. Some states have chosen to define "child abuse" in this manner in order to allow case-by-case determinations based upon subjective criteria.¹⁷ All states define "child abuse" to include physical injury, but a few do not include sexual abuse,¹⁸ emotional abuse,¹⁹ or neglect²⁰ in their definitions.

Another ambiguity in many statutes is the identity of the abuser. Whether or not the injury or omission must result from a specific person's actions depends upon the scope of the definition as set forth in the particular state statute. Ten states include identification of the abuser within the definition of abuser.²¹ In other states reporting is mandatory regardless of the perpetrator's identity. Examples of policies identifying potential abusers include: "a parent, or other person legally responsible for his care or custody of a child less than eighteen years old," and mistreated "by a person who is responsible for [his] welfare,"²² It is important to note that the expressed definitions and guidelines for reporting suspected abuse or neglect are not necessarily the same guidelines and standards

16. Note, *Child Mistreatment: An Overview of Current Approaches*, 18 J. OF FAM. L. 115, 121 (1979-80).

17. See, e.g., WASH. REV. CODE ANN. § 26.44.020(12) (West 1986).

18. Freiman, *supra* note 2, at 254 n. 88 (citing New Mexico, South Dakota, Tennessee, and Texas).

19. *Id.* at 254, n. 87 (citing Georgia, Indiana, Iowa, Maryland, Minnesota, Oregon, and Wisconsin).

20. *Id.* at 254, n. 89 (citing Idaho).

21. Alan Sussman, *Reporting Child Abuse: A Review of the Literature*, 3 Fam. L. Q. 245, 257 (1974).

22. *Id.* at 257.

that will be used in the final determination of whether or not the abuse or neglect actually occurred.²³

Finally, the degree of certainty required of a reporter is customarily codified. In general, there are two different standards: objective and subjective. An objective standard refers to "what the reasonable man in similar circumstances would believe to be the case, whether or not the individual in question actually formed the belief."²⁴ The statutory language establishing an objective standard may contain terms such as "reasonable cause to believe," "cause to believe," or "reason to believe or suspect."²⁵ The Model Act employs an objective standard by requiring reporting if one "knows or has reasonable cause to suspect that abuse or neglect has occurred."²⁶ A subjective standard requires only that the individual reporting the abuse or neglect form the requisite suspicion to report. States employing the subjective standard use statutory language such as "the observer believes" or "the observer suspects."²⁷ The distinction between these two standards may potentially determine liability in a civil action brought against a mandatory reporter for failure to report.

B. Reporting Incentives

Immunity from legal action is the primary incentive states provide to encourage mandatory reporters to comply with their statutory duty to report. The rationale for this policy is to deter the possibility of legal entanglement from the reporter's perspective. All states, the District of Columbia, the Virgin Islands, and Puerto Rico have protected mandatory and voluntary reporters from civil or criminal liability for all acts required or permitted by the particular statute.²⁸ This immunity only applies, however, to those reporters acting in

23. ALAN SUSSMAN & DAVID COHEN, REPORTING CHILD ABUSE AND NEGLECT: GUIDELINES FOR LEGISLATION 14, 15 (1975).

24. Freiman, *supra* note 2, at 258 n. 125 (citing as examples North Carolina, Rhode Island, Tennessee, Texas, Utah, and Wyoming).

25. *Id.* at 258.

26. Model Act, *supra* note 9, at § 5 commentary.

27. Freiman, *supra* note 2, at 258 n. 125 (citing as examples Iowa and Rhode Island); Aaron, *supra* note 13 (citing as examples Alabama, California, Delaware, and New Mexico).

28. *Id.* at 263 n. 168 (citing as examples Arizona, Florida, and Indiana).

good faith.²⁹ The Model Act also contains similar good faith immunity provisions.³⁰

Additionally, most state statutes impose penalties for knowing and willful failures to report. The majority of state statutes classify the failure to report as a criminal misdemeanor punishable by up to one year in jail, maximum \$1000 fine, or both.³¹ The imposition of criminal sanctions for neglect of a duty requiring such extensive personal judgment has been criticized as unduly harsh.³² The risk of criminal prosecution, however, encourages reporting by offsetting the "psychological barriers" presented by the feeling of acting as an informant.³³ A minority of states provide for only civil penalties and some states provide for both civil and criminal penalties.³⁴ Additionally, a "failure to report" may result in civil liability imposed by applying either statutory negligence or common law theories.³⁵ To establish a case of statutory negligence the plaintiff must prove that the mandated reporter: (1) had a legal duty to report the abuse or neglect, (2) breached that legal duty, (3) the failure to report was causally connected to the resulting harm claimed, and (4) there was injury or damage.³⁶ Caselaw also adds to incentives for compliance. For example, in *Aigner v. Cass School Township*³⁷ the appellate court held that substantial evidence of a teacher's failure to report a suspected case of child abuse immediately was an appropriate factor to consider when deciding whether or not to terminate the teacher's employment contract. Exposure to civil liability arguably strengthens existing reporting schemes. Courts may be more willing to impose civil sanctions rather than criminal penalties, thus the fear of liability would still compel compliance.³⁸ Additionally, the risk of civil liability may operate as a financial deterrent to noncompliance as well

29. *Id.*

30. 42 U.S.C. § 5103(b)(2)(A) (1988).

31. Arthur Schwartz & Harold Hirsh, *Child Abuse and Neglect: A Survey of the Law*, 28 MED. TRIAL TECH. Q. 293, 311 (1982).

32. *Id.*

33. *Id.*

34. Freiman, *supra* note 2, at 261.

35. Aaron, *supra* note 13, at 191-207 (giving a full discussion of the establishment of civil liability through statutory and common law theories of negligence).

36. *Id.* at 195-207.

37. 577 N.E.2d 983 (Ind. Ct. App. 1991).

38. Rowine H. Brown & Richard B. Truitt, *Civil Liability in Child Abuse Cases*, 54 CHI.-KENT L. REV. 753, 762 (1978).

as a means to pay for some of the injuries to the "abused child."³⁹

C. Dynamics of School Settings

Despite the strong public interest in reporting, studies confirm that teachers remain reluctant to file reports of known or suspected child abuse or neglect,⁴⁰ and when they do file reports, teachers oftentimes do not follow procedures specified in the statutes.⁴¹ A Virginia study found that of the four major groups reporting suspected child abuse or neglect e.g., friends and neighbors, anonymous persons, relatives, public school teachers; teachers, the only mandatory group of reporters, contributed the smallest portion of reports (10%).⁴² A Kansas study found that elementary teachers were more likely than high school teachers to suspect and report child abuse, but that they would report abuse to school officials rather than to the official reporting agency.⁴³ Almost one-half of reported abuse cases involved school age children, but only twelve percent of reports filed were by school personnel.⁴⁴

A more extensive study from Michigan confirmed these phenomena.⁴⁵ The "failure to report problem" is twofold, first, teachers seldom report and second, when they report, it is not done in the legally prescribed manner. Teachers acknowledged that in cases where they failed to report to the proper authorities, abuse had been observed, but was purposefully not reported.⁴⁶ The Michigan study sought to discriminate between the types of abuse more likely to be reported by teachers. Nonaccidental physical injuries, the most frequent form of abuse, constituted the largest group of unreported, but

39. *Id.*

40. AMERICAN ASSOCIATION FOR PROTECTING CHILDREN, HIGHLIGHTS OF OFFICIAL CHILD NEGLECT AND ABUSE REPORTING, 1986 (1988); WESTAT ASSOCIATES, STUDY OF THE NATIONAL INCIDENCE AND PREVALENCE OF CHILD ABUSE AND NEGLECT (1988); Lanthan D. Camblin, Jr. & H. Thompson Preut, *School Counselors and the Reporting of Child Abuse: A Survey of State Laws and Practices*, 30 SCH. COUNS. 358 (1983).

41. Abrahams et al., *supra* note 13; Baxter & Beer, *supra* note 13.

42. VIRGINIA DIVISION FOR CHILDREN, CHILD ABUSE AND NEGLECT IN VIRGINIA, (1983).

43. Richard J. Shoop & Lynn M. Firestone, *Mandating Reporting of Suspected Child Abuse: Do Teachers Obey the Law?* 46 WEST'S EDUC. L. REP. 1115 (1988).

44. *Id.* at n. 21.

45. Lombard et al., *supra* note 1.

46. *Id.* at 667.

observed, cases (10.9%).⁴⁷ "In contrast, none of the thirty mental injury cases (0%), two of eighty-one mistreatment cases (2.5%), and three of eighty-six neglect cases went unreported (3.5%)."⁴⁸ This result may appear to be counter-intuitive, and bears further investigation. The reasons given by teachers who admitted their failure to report included: fear of reprisals to the child (thirty-five percent), a feeling the reporting would not help (thirty-one percent), and opposition to invading family privacy (ten percent).⁴⁹

Research also shows that teachers fail to comply with statutory procedures for reporting. The Michigan study revealed that approximately sixty-six percent (87/131) of the teachers surveyed reported observations of abuse or neglect to other individuals in their schools and approximately fifty-nine percent (77/132) reported only to their school principal or assistant principal.⁵⁰ Department of Social Services statistics supported the same finding--four times as many reports are filed by principals as teachers.⁵¹ This practice was in clear violation of the reporting statutes as they were written and intended to be implemented.

IV. EDUCATIONAL INCENTIVES INFLUENCING REPORTING

Beyond the reasons set forth in the research, other societal, organizational, and educational disincentives for reporting may be identified. Foremost, individual perceptions of the child-parent relationship, particularly the parameters of appropriate discipline, vary greatly. Many teachers hold a stereotype of "benevolent parenthood" that prohibits them from admitting the fact that parents do abuse their children.⁵² On a broader scale, privacy values may play some role. Freedom from state intervention into any aspect of one's life is a highly held American value. Many teachers believe in the rights of parents to discipline their children and are not sure about the role of the school to intrude in this private family matter.⁵³ Filing a

47. *Id.* at 668.

48. *Id.*

49. *Id.* at 669.

50. *Id.* at 662.

51. *Id.* at n.22.

52. EDSSEL L. ERICKSON ET AL., CHILD ABUSE AND NEGLECT: A GUIDEBOOK FOR EDUCATORS AND COMMUNITY LEADERS (2d ed. 1984).

53. *Id.*

report necessitates, at a minimum, some resolution of these two basic issues by the individual. Others theorize that teachers are hesitant to report due to a lack of diagnostic expertise.⁵⁴

The professional dynamics of schools may contribute to the reluctance of teachers to report. Cooperative parent-school relationships are a cornerstone of successful education. School administrators, especially principals, strive to create and maintain positive relations. Teachers' positive interactions with parents help establish successful school-family relations.

Teachers commonly express anxieties about dealing with parents⁵⁵ since they must interact with parents in multiple contexts (e.g., parent-teacher conferences, extracurricular activities, and other school events). Teachers may fear confrontation with an allegedly abusive parent, especially since most teachers are personally concerned for the sake of the child's long-term educational prospects.

In smaller school districts, these dynamics may be further compounded by factors of scale. Involvement in community activities presents many opportunities for face-to-face exchanges. Additionally, the teacher may have personal acquaintance with the parent who is implicated and not want to report a "friend." Teachers may often be dissuaded by the belief that the abuse is an isolated incident which will not happen again.

Research confirms these dissuading factors. Teachers attribute their reluctance to report to a lack of community support and feelings of isolation, particularly in small communities.⁵⁶ Working with a child and parent after a report has been made also is difficult for a teacher and, in some cases, causes teachers to fear reprisals.⁵⁷ Complying with mandatory reporting is particularly difficult for a teacher if the principal is reluctant to report.⁵⁸ Some principals are reluctant to risk a

54. Salmon & Alexander, *supra* note 1, at 14.

55. JOSEPH BLASE, *THE POLITICS OF LIFE IN SCHOOLS* 199 (1991).

56. Abrahams et al., *supra* note 13; Bonnie Trudell & Marianne H. Whatley, *School Sexual Abuse Prevention: Unintended Consequences and Dilemmas* 12 *CHILD ABUSE & NEGLECT* 113 (1988); J. Patrick Turbett & Richard O'Toole, *Teachers' Recognition and Reporting of Child Abuse*, 53 *J. OF SCH. HEALTH* 605 (1983).

57. Abrahams et al., *supra* note 13; J.D. Alfaro, *Impediments to Mandated Reporting of Suspected Child Abuse and Neglect in New York City* (Unpublished paper presented at the Seventh National Conference on Child Abuse and Neglect (Chicago, IL 1985)).

58. Cynthia C. Tower, *HOW SCHOOLS CAN HELP COMBAT CHILD ABUSE AND NEGLECT* 52 (1987) (a pamphlet published by the NEA); Abrahams et al., *supra*

negative image of their schools for having reported suspected abuse.⁵⁹ The organization of schools may also impede reporting. Schools are governed by lay boards which are dependent in many respects upon public support and goodwill for resources. The various levels of hierarchy within the schools, along with the degree of specialization among teachers and other staff may serve as environmental buffers. Teachers report to an assistant principal or principal, a district superintendent, a school board, and perhaps even the state department of education. In addition, numerous specialists' roles support the teaching function. Counselors, social workers, school nurses, and special education teachers provide assistance and service coordination for classroom teachers.⁶⁰

The mandate to report an instance of child abuse or neglect directly and independently to an external agency creates countervailing pressures for teachers as to whom they owe a duty, whom they are bound to inform, and in what order this must be effectuated. The mandate for teachers to report directly to an outside agency conflicts with an environment where the culture requires cooperative staffing between multiple specialists to address the problems of an individual student. This environment may also predispose toward a "let someone else report" attitude,⁶¹ especially in a system where a number of "mandatory reporters" have contact with the child. In contentious areas, consultation and confirmation by colleagues may be preferred before action is taken.

Yet, state statutes clearly denote that oral reports are to be given directly and immediately to the designated social service agency, followed by a written documentation of the report. Several policy arguments support this method of reporting. Social service agency personnel possess the expertise, training and qualifications to assess the validity of reports. Such expertise is also necessary to determine when and to what extent intervention is appropriate. If certain services are deemed necessary, the social service agency also can provide these directly. The filing of a claim with social service agencies requires a formal investigation of all relevant facts. The social

note 13; Cynthia C. Tower, *CHILD ABUSE AND NEGLECT: A TEACHER'S HANDBOOK FOR DETECTION, REPORTING AND CLASSROOM MANAGEMENT* 32 (1984).

59. Tower, 1984 & 1987, *supra* note 58, at 33 (1984) and 51-52 (1987).

60. Tower (1984), *supra* note 58, at 38.

61. Pat Alford et al., *A Profile of the Physical Abusers of Children*, 33 SCH. COUNS. 143 (1985).

service agencies have access to the state abuse registries if they exist in the jurisdiction of concern,⁶² and are positioned to make more informed judgments about the extent of, and appropriate response to, the abuse.

Allowing school principals or other administrative officials to perform a "screening" function before filing reports may be imprudent for several reasons. First, principals are subject to many of the same pressures affecting teachers. Second, they bear administrative responsibility for maintaining good relationships with parents in their attendance areas. One false or unfounded report can generate parental ire and community disapproval as well as pose risks to careers in the politicized environment of local schools. Finally, a principal also lacks the first-hand knowledge and sensitivity to behavioral changes of the student that the teacher holds.⁶³ The need for certainty and, in some jurisdictions, identification of the abuser may deter the filing of reports.

There is another perspective, however, on the question as to which agency should receive reports of abuse. The option of "gradual reporting" by teacher to administrator and administrator to agency may remove barriers enough to be more effective in the long run. By reporting to the administrator, a teacher may face less personal risk of a confrontation with a hostile parent. The administrator, in turn, acts as a protective buffer for teachers in performing their mandated duty. The teacher may not have to be identified as the reporter in the formally filed complaint. The chance of criminal or civil liability may be decreased for the teacher. This alternative also may appeal to administrators as well. If administrators are given responsibility to determine whether or not to report to the social service agency, they may exercise review authority while still facing the possible threat of legal liability. He/she may be no more plagued with risk than in the current system, yet may feel better able to anticipate the consequences.⁶⁴

62. Freiman, *supra* note 2; Schwartz & Hirsh, *supra* note 31.

63. Lombard et al., *supra* note 1, at 662-5 (giving a more comprehensive discussion of reasons for not having principals "screen" reports).

64. *Id.*

V. LITIGATION OVER REPORTING

The threat of legal liability is often understood to operate as the primary incentive for abiding by the law. However, this threat means little without follow-through. The imposition of liability provides an incentive structure for compliance. To date, this has been a missing link in the effective implementation of child abuse reporting laws as they pertain to school teachers and administrators reporting the abuse and neglect of children in their home settings.

A WESTLAW⁶⁵ search for all reported state and federal decisions involving a claim against a school teacher or administrator for the failure to report child abuse or neglect was conducted. The query⁶⁶ retrieved eighty-six state and eighteen federal cases. Only one reported case in which school officials were being sued for their failure to report abuse committed by parents, or someone in a home setting, was directly on point.⁶⁷ Eleven others addressed issues of reporting related to the administration or effect of the statute. Of the cases identified, only five involved abuse arising in a home setting. The other seven alleged abuse occurring in the school setting including one which addressed the ancillary problem of disclosure under the public records statutes.

Table 1
Caselaw: Failure to Report Child Abuse

ABUSE IN HOME (n=5)	ABUSE IN SCHOOL (n=7)
FAILURE TO REPORT	
Mattingly	Bellevue Grover Pesce
IMMUNITY-RETALIATION	
Dunajewski Jenkins Landstrom Mattingly McDonald	Aigner Bellevue Cromley Pesce

65. West Publishing's on-line legal research database.

66. "failure to report' 'failure to comply' /p 'child abuse' neglect/25 Child!"

67. Mattingly v. Casey, 509 N.E.2d 1220 (Mass. App. Ct. 1987).

INDIRECT REPORTING

Dunajewski	Bernstein
Landstrom	Cromley
Mattingly	

WHO SUES

<u>PARENTS</u>	<u>PROSECUTOR</u>
Dunajewski*	Bernstein
Jenkins*	Grover
Landstrom*	
Mattingly	<u>PARENTS</u>
McDonald*	Bellevue
	<u>EMPLOYEES</u>
	Aigner
	Cromley
	Pesce

DISCLOSURE

South Coast Newspapers

* false report

The twelve cases reflect many of the problems identified in the prior discussion of the reporting statutes. These include litigation over five basic issues: failure to report, immunity for reporting and from other forms of retaliation, indirect reporting or reporting to a non-designated agency, identifying who may sue, and disclosure.

A. Failure to Report

Four cases directly or indirectly addressed the alleged failure of school personnel to report abuse. These cases illustrate a range of variance in the laws. One case⁶⁸ involved a failure to report which resulted in the prosecution of a principal under the criminal misdemeanor provisions of the reporting statute. The other three addressed the limits of permissible delay or degree of certainty necessary before filing a report.⁶⁹ One case involved allegations of abuse committed

68. State v. Grover, 437 N.W.2d 60 (Minn. 1989).

69. Mattingly, 509 N.E.2d at 1220; Pesce v. Sterling Morton High Sch., 830 F.2d 789 (7th Cir. 1987); Bellevue Pub. Sch. Dist. No. 405 v. Benson, 707 P.2d 137 (Wash. Ct. App. 1985).

in the home setting,⁷⁰ while the other three dealt with abuse occurring in the school.⁷¹

The issue of determining what constituted abuse subject to the reporting laws was at the core of two cases. One case directly addressed a claim that school personnel had failed to report abuse under the statute's criminal penalties for nonreporting.⁷² The alleged abuse in this case was committed by teachers and illustrates the difficulty of defining an appropriate, commonly understood standard of abuse particularly when allegations are somewhat vague and against subordinate employees. The question involved discerning possible sexual abuse from discipline by an elementary teacher who was alleged to have "pinched [a student] on the buttocks on two occasions, . . . having squeezed the buttocks of [a student] . . . having choked [a student] in class and in the bathroom, . . . and having patted [a student] on the buttocks as she was leaving the classroom."⁷³ The parents of the two students involved contacted the social services reporting agency after complaining to the principal, who decided not to act upon the allegation. The principal's constitutional challenge to his subsequent conviction for failing to report was based upon grounds of statutory vagueness and overbreadth, but was denied by the court. The second case involved similar allegations of abuse arising in the school setting by school employees and the degree of certainty necessary to require filing a report. A principal was demoted for not reporting abuse described to him by a school custodian. The custodian told the principal that a sixth-grade girl had said that she had had sexual intercourse with another custodian two days earlier. The girl told no other school personnel about the incident. Based on the unconfirmed, secondhand nature of the complaint, the principal filed no formal report.⁷⁴

The remaining two cases further illustrate issues arising from the degree of latitude in reporting accorded to school personnel both as to the timeliness and the evidence of abuse. *Mattingly* involved a claim of negligence against school personnel, including a teacher, school nurse, and a principal,

70. *Mattingly*, 509 N.E.2d at 1220.

71. *Grover*, 437 N.W.2d at 60; *Pesce*, 830 F.2d at 789; *Benson*, 707 P.2d at 137.

72. *Grover*, 437 N.W.2d at 60.

73. *Id.* at 60.

74. *Bellevue Pub. Sch. Dist. No. 405 v. Benson*, 707 P.2d 137 (Wash. Ct. App. 1985).

for failure to report abuse in a timely fashion. School personnel had observed at least sixteen instances of bruises and cuts in the same pupil over a two year period but had accepted the step-mother's explanations for each and had not filed a report. The school nurse finally filed a report two months before the pupil suffered a fatal beating. The court found that the actions of the personnel did not violate their duty to report under the statutes since the officials could exercise some judgment as to whether each instance of bruises and cuts constituted abuse and since they finally did report. School personnel were permitted "to consider the gravity of the child's hurts, what they know about [the] family, and what this portended. Section 51A does not require the reporting of every bruise; it requires reporting on the basis of indicators which give reasonable cause to believe that a child is being abused."⁷⁵

*Pesce*⁷⁶ provides an interesting contrast in terms of the elapsed time and degree of certainty allowed before filing the requisite report. *Pesce*, a tenured teacher and school psychologist/counselor, was disciplined by the school board for his ten day delay in failing to report suspected child abuse. The court sustained the school district's disciplinary action against the counselor for failure to comply with the statute which required "prompt" reporting of suspected abuse."

The facts in *Pesce* indicated that a male student, upon the urging of a worried friend, visited Dr. *Pesce* for counseling. After Dr. *Pesce* assuring the student of the confidentiality of their conversations, the student claimed that a teacher had shown him pornographic pictures during a visit to his home. Although he denied any sexual acts during the encounter with the teacher and any resultant suicidal intentions, the student indicated confusion and concern over his own sexual preference. Ten days later, after two additional and one cancelled meeting, the student revealed to Dr. *Pesce* and a professional therapist that the encounter with the teacher had, in fact, involved sexual contact. At that point Dr. *Pesce*, with the student's consent, reported the incident to the superintendent and the responsible social services agency. The elapsed time period between initial suspicion of suspected abuse and confirmation by the victim was ten days.

75. *Mattingly v. Casey*, 509 N.E.2d 1220 (Mass. App. Ct. 1987).

76. *Pesce v. Sterling Morton High Sch.*, 830 F.2d 789 (7th Cir. 1987).

B. Immunity/Retaliation

The most commonly litigated issue in the cases involved immunity for reporting. In the cases identified in this search immunity had two components: immunity from legal liability for the act of reporting; and immunity from resulting changes in employment status. The former arose from state law provisions giving protection to reporters for filing reports. The latter is generally not addressed in state statutory schemes. Immunity does not extend to the employment consequences for school personnel of either reporting or failing to report. Five cases addressed in some way the scope of immunity from liability for reporting. All involved allegations of abuse by parents or persons in the home setting. All sustained the immunity of school personnel for reporting, even when no basis for the allegation was later found⁷⁷ or when delays in reporting adversely affected the child.⁷⁸ Nor could liability under either state or federal civil rights statutes be invoked.⁷⁹ Though limited, the cases on point demonstrate that courts sustain the provisions for immunity from suit with some regularity.

As indicated above, state laws providing immunity for reporting do not extend to actions taken against school personnel in the context of their employment. Four cases dealt with what weight either reporting or failing to report could be given in subsequent disciplinary actions against school personnel. All four cases involved allegations of abuse in the school setting. Three cases identified by this research confirm that a delay or failure to report may be considered as evidence of competence when making a decision is made to renew a teacher's contract⁸⁰ or as a basis for disciplining or demoting school personnel.⁸¹ Due process protections must be employed in such actions.⁸²

77. *Jenkins v. Marava*, No. Civ A. 89-0284-Z 1990 WL 98048 (D. Mass. June 29, 1990); *Landstrom v. Barrington Sch. Dist.*, 739 F. Supp. 441 (N.D. Ill. 1990); *Dunajewski v. Bellmore-Merrick Cent. High Sch.*, 526 N.Y.S.2d 139 (N.Y. App. Div. 1988); *McDonald v. State*, 694 P.2d 569 (Ore. Ct. App. 1985).

78. *Mattingly*, 509 N.E.2d at 1220.

79. *Jenkins*, 1990 WL at 98048.

80. *Aigner v. Cass Sch. Township*, 577 N.E.2d 983 (Ind. Ct. App. 1991).

81. *Pesce v. Sterling Morton High Sch.*, 830 F.2d 789 (7th Cir. 1987); *Bellevue Pub. Sch. Dist. No. 405 v. Benson*, 707 P.2d 137 (Wash. Ct. App. 1985).

82. *Benson*, 707 P.2d at 137.

The fourth case, however, identified a much more problematic fact pattern. *Cromley*⁸³ involved a charge of retaliatory discharge against a school district. Marcella Ann Cromley, a teacher, filed a report of abuse directly to the social services agency after her principal failed to act upon her informing him of the alleged abuse. The abuse alleged in the case was committed by another teacher in Cromley's department. Cromley learned of the abuse from the student directly. Subsequently, Cromley was forbidden to speak to the social services worker investigating the report, removed as department head, criticized by other faculty for false evaluations and criticism, and eventually discharged from employment. The reported decision in this case dealt with the weight accorded to First Amendment protections in termination from employment, and resulted in a motion to dismiss being granted to the school district.

C. Indirect Reporting

Direct reporting, the requirement that teachers or school personnel independently file reports of child abuse with the designated child protection agency, is the preferred statutory reporting scheme. However, indirect reporting, or the consultation and screening of reports through intermediary officials, would appear to dominate practice. While the practice of indirect reporting was an issue in only two cases,⁸⁴ all but two of the remaining ten cases⁸⁵ revealed factual patterns in which the mandatory reporter either consulted with other school personnel or deferred responsibility for reporting to another. State statutory provisions, which generally require direct reporting to state child protective services, do not appear to be followed in practice. The two cases raising this issue did not repudiate reliance upon direct reporting.

In *People v. Bernstein*,⁸⁶ the criminal conviction of a school district administrator for failure to report child abuse was reversed. The administrator had reported an instance of abuse to a school police unit rather than to the county agency. The

83. *Cromley v. Board of Educ.*, 699 F. Supp. 1283 (N.D. Ill. 1988).

84. *Dunajewski v. Bellmore-Merrick Cent. High Sch.*, 526 N.Y.S.2d 139 (App. Div. 1988); *People v. Bernstein*, 243 Cal. Rptr. 363 (Cal. App. Dep't Super. Ct. 1987).

85. *State v. Grover*, 437 N.W.2d 60 (Minn. 1989); *Benson*, 707 P.2d at 137.

86. 243 Cal. Rptr. 363 (Cal. App. Dep't Super. Ct. 1987).

court held that the school district's police unit constituted a "child protective agency" within the meaning of the statute and, consequently, the administrator had complied with the reporting mandate.⁸⁷

In a second case, *Dunajewski*, a court found that no libel had occurred in a civil suit when, in addition to a report made to the child protective agency, the report was sent to the school's internal committee responsible for reviewing the needs of special education students. The student who was the subject of the report had had prior behavioral and academic problems. The court determined that the committee constituted an "authorized recipient".⁸⁸

Although not a cause of action in the remaining cases, problems with reports made to other agencies or school personnel were evident in many cases identified in this survey. The pattern and practice of school personnel who consulted with each other over a two-year period about questions as the evidence of child abuse was documented in *Mattingly*, a case discussed earlier.⁸⁹ *Cromley v. Board of Education*,⁹⁰ a case involving the issue of retaliatory discharge, illustrates the troublesome conflicts and pressures upon school personnel when the screening or referral of reports occurs where the alleged abuse is by other teachers or employees.

Finally, *Landstrom*⁹¹ illustrates additional legal issues under *Monell*⁹² raised by the conflict between statutory requirements for direct reporting to social service agencies by mandatory reporters and the actual practice of consultation and deferral to administrators' decisions in such matters. In an action for damages involving a report of abuse which later proved to be unfounded, parents sued a school district rather than the teacher. The teacher had reported abuse to her principal, who independently evaluated the situation and filed a report with the child protective agency. The case was decided on a question of whether the school district would be held liable for the principal's alleged civil rights violations under *Monell*. Important to the facts, although not crucial to the outcome, was the teacher's independent duty under state law to

87. *Bernstein*, 243 Cal. Rptr at 365.

88. *Dunajewski*, 526 N.Y.S.2d at 139.

89. *Mattingly v. Casey*, 509 N.E.2d 1220 (Mass. App. Ct. 1987).

90. 699 F. Supp. 1283 (N.D. Ill 1988).

91. 739 F. Supp. 441 (N.D. Ill. 1990).

92. *Monell v. New York City Dep't of Social Serv.*, 436 U.S. 658 (1978).

report abuse directly. Consultations between teachers and administrators prior to reporting may broaden the scope of liability for not reporting to include the district as a whole. This may result in a transfer of liability to the school district as the practice of indirect reporting becomes entrenched. Such a practice may benefit plaintiffs in search of deeper pockets. The economics of litigation from a plaintiff's perspective creates incentives to sue the district in addition to, or instead of, a teacher or principal when responsibility for reporting decisions can be shown to be attributable to the district.

D. Who May Sue

The issue of who may sue to enforce mandatory reporting is important to ensure the effectiveness of compliance with the statutory mandate. Generally, prosecutors appear to be reluctant to initiate criminal action against school personnel for their failure to report. Only two cases in this survey involved criminal prosecutions.⁹³ Both cases involved abuse occurring in school settings. Only one case directly dealt with a failure to report,⁹⁴ whereas the second dealt with a report filed with the wrong agency.⁹⁵

In civil suits, cases where a prosecutor may have opted not to pursue criminal sanctions, parents are the party with the greatest incentives for suing the alleged abuser, the negligent reporter, or the agencies responsible for removing the child from the custody of the family.⁹⁶ Similarly, when the abuse is committed by school personnel, parents have every incentive to sue for the failure to report, whether to recover damages or to force the district to remove the offending parties. However, in cases where the parent or someone in the home setting is the perpetrator of the abuse, a civil suit may be impossible in practice. In reality, there is no one available with the incentives or motivation to sue on behalf of the child for a failure to report. Although a guardian ad litem or a social service agency has the authority to sue the school, principal, or teacher on behalf of the child abused in the home setting when there is a failure to report, no evidence that this sanction is

93. *State v. Grover*, 437 N.W.2d 60 (Minn. 1989); *People v. Bernstein*, 243 Cal. Rptr. 363 (App. Dep't. Super. Ct. 1987).

94. *Grover*, 437 N.W.2d at 60.

95. *Bernstein*, 243 Cal. Rptr. at 363.

96. *Brown & Truitt*, *supra* note 39, at 767.

employed to enforce the reporting law was found in this survey. Although parents filed suits when reports alleging abuse in the home setting were later found to be false,⁹⁷ only one case was identified in which a parent sued for a school's delay in reporting abuse of his child by her stepmother.⁹⁸ The court rejected the father's attempt to recover damages from the school as an unacceptable shifting of responsibility from himself, in his capacity as father, present in the home during the period when the abuse took place, to public officials.

E. Disclosure

A somewhat unrelated case deserves brief acknowledgement because of the plausible disincentive it offers for enhancing implementation of the mandatory reporting laws. In a suit for access to police records by a newspaper, a California court of appeals held that the public was entitled to access to a copy of the police report of an investigation undertaken by officers after an oral complaint from residents and parents that the high school principal had failed to report an incident of child abuse. While the court imposed guidelines and restrictions to protect procedural, constitutional and other legal rights, the general right of disclosure allowed under state law in this case may further add to the general reluctance of school personnel to report. The disincentives to report may be magnified by the fact that the report can become public knowledge.⁹⁹

VI. IMPLICATIONS AND CONCLUSIONS

Despite limited evidence, analysis of the caselaw appears to confirm many of the critiques of the child abuse reporting statutes in educational settings. Very few decisions involving the failure of school districts to comply with the reporting statutes as to abuse or neglect arising in home settings have been reported. The limited case law on failure to report abuse

97. *Jenkins v. Matava*, No. CIV. A. 89-0284-Z, 1990 WL 98048 (D. Mass. June 29, 1990); *Landstrom v. Barrington Sch. Dist.*, 739 F. Supp 441 (N.D. Ill. 1990); *Dunajewski v. Bellmore-Merrick Cent. High Sch.*, 526 N.Y.S. 2d 139 (App. Div. 1988); *McDonald v. State*, 694 P.2d 569 (Ore. Ct. App. 1985).

98. *Mattingly v. Casey*, 509 N.E.2d 1220 (Mass. App. Ct. 1987) (the delay was two years).

99. *South Coast Newspapers v. City of Oceanside*, 206 Cal. Rptr. 527 (Ct. App. 1984).

arising in the home may reinforce the general evidence that school personnel contribute a relatively small portion of child abuse reports which are filed. While the reasons for this are not clear, analysis of the few cases in this area sheds some light on the incentives and disincentives which may condition reporting of abuse arising in home settings.

Ironically, the caselaw addressing reports of abuse occurring in school settings appears with greater frequency and receives greater attention in the education literature. Clear distinctions emerge in the incentive structures which differentiate and motivate the reporting of abuse arising in home as opposed to school settings. While encouraging reporting of abuse in educational settings may not have been a primary reason for the passage of mandatory reporting laws, these laws appear to be more successful in identifying and addressing an additional source of abuse inflicted upon children than in meeting the original goal of reporting abuse occurring in home settings.

This difference between the effect of the reporting statutes upon abuse occurring in the home as opposed to school settings may be due in part to the design of these statutes as identified by this review of the caselaw. Fewer problems appear to arise from the statutory ambiguities described in the literature than from areas in which the statutes are more clearly defined: the provisions for immunity from suit for reporting and the mandate for direct rather than indirect reporting by school personnel. Each of these problems appears to impact reporting differentially and to depend in part upon whether the abuse occurred in a home or a school setting.

The provision for immunity from suit was designed to remove the potentially adverse consequence of liability for reporting by school personnel. Where false reports of abuse arising in the home may have been filed, the cases confirm the apparent effectiveness of such immunity. Moreover, in cases of false reports, parents who feel wrongly accused may have a strong desire to sue. However, providing immunity does not reach the problem of the failure of school personnel to report abuse occurring in a home setting when that abuse is later confirmed. In such cases no one is available to sue on behalf of victims of this form of abuse when it is observed but not reported by school personnel. While immunity from suit may be viewed as facilitating reporting, the reporting statutes do not deal effectively with a remedy for, or consequences of, failing to report suspected abuse in home settings. The fact that no

immunity is available for reporting when adverse consequences to employment result would also appear to influence reporting, particularly of abuse arising in school settings. Failure to report can be used as a criterion for decisions about employment issues. This is particularly troublesome when the alleged source of abuse is a colleague, a subordinate, or a superior. Knowledge of the potential or real consequences upon one's employment status may create strong disincentives to report, especially when the abuse is inflicted by school personnel. Erroneous or unsubstantiated reports about in-school abuse present even greater exposure to adverse employment consequences for school personnel, especially given the culture of school organizations which rewards cooperation and consensus. Offsetting these disincentives to report, however, may be the motivations for suit by a greater number of non-school parties based on a failure to report. Both criminal prosecutors and, more importantly, parents are motivated to monitor a school's failure to report abuse by its own personnel. These reasons, along with employee disputes about the adverse consequences of their reporting or failure to report, may account for the greater frequency of reported caselaw for abuse occurring in schools.

The cases indicated that statutory requirements for direct rather than indirect reporting are ignored in practice. While the effect of this practice upon reporting of abuse arising in the home may be less problematic than upon that in school settings, problems remain with screening or consulting prior to reporting. Despite teachers' better vantage point in identifying cases where the abuse occurs in a home setting, the caselaw illustrates their reluctance to report without consulting peers or superiors. This may arise from their understanding of the consequences of such reports, from personal commitment to the continuing welfare of the child, and from their knowledge of the services available to support that child within the school. The utility of the mandate requiring direct reporting may be challenged when noncompliance appears to be widespread and to undermine the organizational culture of the school. Problems with indirect reporting do not appear to be serious when the abuse in question occurs in home settings. There is one caveat which must be incorporated into this observation. While individuals are immunized from liability, indirect reporting may expose school districts to liability under *Monell*. When a pattern of indirect reporting continues, districts may wish to

address the policy implications of such liability directly and develop appropriate procedures.

In situations where abuse occurs in school settings or by school personnel, indirect reporting may be problematic. Such cases necessarily involve an additional layer of complexity — employment relationships. Consultation prior to the reporting of abuse committed by another employee creates conflict between school personnel. The disruptions are particularly troublesome when a superior does not file a subordinate's report. At that point the initial reporter has few acceptable options. The consequences to employment status from reporting may weigh more heavily than those of not reporting. Only the interests of parents in isolating the offender may offset the organizational dynamics of this class of situations.

The basic question remains: how can the social policies behind the child abuse reporting laws be transformed by schools into effective implementation strategies and successful results? Our analysis suggests that an understanding of the problems encountered in implementing the mandate for the reporting of child abuse by school personnel is enhanced by viewing the problem as two separate issues: abuse occurring in home settings and abuse occurring in school settings. A clearer understanding of the incentive structure which may influence reporting by educators emerges from this distinction. So too, may the basis for discussion about possible policy and statutory reform be expanded.

Child abuse occurs in many settings. Existing reporting statutes do not distinguish between the possible sources of abuse and the barriers to reporting in each. Schools must deal with abuse inflicted on children both at home and at school. The incentives for reporting vary according to setting and need to be addressed separately. While some coherency in reform may eventually require state legislative action, districts can begin to address the policy implications of the issues identified in this review at the local level and implement strategies to overcome the problems arising from existing reporting statutes.